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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

ELISA MEJIA,

Plaintiff and Appellant,

v.

RETAILERS CREDIT ASSOCIATION OF GRASS
VALLEY, INC. et al.,

Defendants and Respondents.

C078461

(Super. Ct. No. CU14080733)

Plaintiff Elisa Mejia appeals from the trial court's order granting special motions to strike her lawsuit as a Strategic Lawsuit Against Public Participation (SLAPP; Code Civ. Proc., § 425.16; statutory section references that follow are to this Code unless otherwise stated). Mejia's lawsuit against Retailers Credit Association of Grass Valley, Inc. (RCA), debt collector for health care provider Dignity Health, Inc. (Dignity), alleges malicious prosecution, conversion, unfair business practices (Bus. & Prof. Code, § 17200 et seq.), and unfair debt collection practices (Civ. Code, § 1788.15). These claims arise from an underlying debt collection lawsuit and activity to enforce the judgment to collect a debt owed by Mejia for health care services provided by Dignity.

Although Mejia's complaint alleges that RCA and Dignity have a practice of causing defaults with false proofs of service and engaging in wrongful collection practices, she insists on appeal that her claims are not a SLAPP because they are based, not on the underlying collection lawsuit, but rather on postjudgment activity in garnishing her wages and refusing to return the money immediately after the collection judgment was vacated due to defect in service of summons and complaint.

Mejia filed a selective Appellant's Appendix omitting records necessary for resolution of the appeal, including declarations and exhibits in support of the anti-SLAPP motions, such as the prior court's finding that the defect in service was a mistake, not fraud. The omissions would be grounds for rejection of the appeal without reaching the merits. (Cal. Rules of Court, rule 8.124(b)(1)(B) [appellant's appendix must contain any item listed in rule 8.122(b)(3) that is necessary for proper consideration of the issues, including any item that the appellant should reasonably assume the respondent will rely on]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) However, RCA has provided a Respondent's Appendix, and we will reach the merits.

We affirm the order granting the anti-SLAPP motions. (§ 425.16, subd. (i) [order granting motion is appealable].)

FACTS AND PROCEEDINGS

I

The Current Complaint

Mejia's verified complaint, filed against RCA and Dignity on September 2, 2014, alleges that Dignity accepted health insurance as payment in full for the services it provided to Mejia, but nevertheless had RCA pursue collection for a non-existent debt. RCA misrepresented to Mejia that she owed money and that it would commence legal proceedings if she did not enter a payment plan. Believing she had no alternative, Mejia agreed to a payment plan and made payments on it for many months. When she was

unable to make the monthly payment, RCA commenced a legal proceeding in Nevada County Superior Court, case No. L79053 -- “[u]nbeknownst to [Mejia]” -- and “purported” to have summons and complaint served upon her. But the summons and complaint were not served on her. RCA filed a “false” proof of service, obtained a default judgment, “waited” for expiration of the statutory time to set aside the default, and then instructed the Sheriff to garnish Mejia’s wages.

Mejia consulted an attorney, who contacted RCA, told RCA that Mejia had never been served with summons and complaint, and she did not match the process server’s description of the person served in the proof of service (POS). RCA refused to vacate the judgment or stop garnishment.

Mejia filed a motion, and the trial court quashed the summons and vacated the judgment. RCA later voluntarily dismissed its collection complaint. RCA nevertheless refused to return her garnished wages and instead informed her it could take several weeks for the county auditor to mail a check after the auditor receives the Sheriff’s request to return the garnished funds. RCA still owes Mejia about \$390, and RCA and Dignity continue to threaten her with collection of unlawful debts.

As a result of this wrongful conduct, Mejia has been unable to secure needed medical services for herself and her special needs daughter, unable to pay her rent and buy necessities, fears eviction, and has incurred late charges on bills.

The complaint’s first count for malicious prosecution alleges RCA and Dignity filed the underlying collection action without cause and continued to garnish wages after learning there was no valid service of summons and complaint, in order to coerce Mejia to pay money she did not owe.

The second count alleges RCA and Dignity “have converted [her] wages to their own use and benefit.”

The third count alleges unfair debt collection practices under Civil Code, section 1788.15, which provides in part: “(a) No debt collector shall collect or attempt to collect

a consumer debt by means of judicial proceedings when the debt collector knows that service of process, where essential to jurisdiction over the debtor or his property, has not been legally effected.”

The fourth count alleges unfair business practices (Bus. & Prof. Code, § 17200 et seq.) based on information and belief that RCA and Dignity have engaged in a constant and continuing practice of causing defaults to be entered in Nevada County based on false proofs of service and thereafter engaging in oppressive and wrongful collection practices.

Mejia seeks general and special damages, attorney fees, unspecified civil penalties, an accounting, punitive damages, an injunction enjoining unlawful or unfair business practices, and costs of suit.

II

The Section 425.16 Motions

RCA and Dignity filed motions to strike the lawsuit as a SLAPP and submitted declarations and documents showing as follows:

RCA, on behalf of Dignity, attempted to collect \$2,548 owed by Mejia for services at Sierra Nevada Memorial Hospital. After phone calls and letters were unsuccessful, Dignity authorized RCA to file a collection lawsuit in Nevada County. RCA filed the complaint on October 22, 2012, and hired a registered process server to serve summons and complaint on Mejia. The POS showed personal service on Mejia at her home at 12:45 p.m. on October 27, 2012. The POS described Mejia as “White, Female, 45 Years Old, Black Hair, Brown Eyes, 5 Feet 6 Inches, 140 Pounds.”

After Mejia failed to respond to the complaint, RCA obtained a default judgment on November 29, 2012, for \$4,273.79 (\$2,548.06 damages, \$901.12 prejudgment interest, \$559.61 attorney fees, and \$265 costs).

Although Mejia claims RCA waited silently until the time passed for relief from default, she was served with the judgment, and on December 13, 2012, she spoke with an RCA employee, agreed to a payment plan, and made monthly payments of \$50 for 14 months. During this time, she never complained of lack of service or said she did not owe the debt.

Mejia stopped making payments, so on March 10, 2014, RCA filed a writ of execution for the then-outstanding balance of \$4,304.14 (deducting credits of \$500 and adding postjudgment interest) and served the Sheriff's office with papers to garnish Mejia's wages.

On March 31, 2014, Mejia's attorney filed a motion to vacate the judgment and quash the writ of execution, on the ground that Mejia was not served with summons and complaint, and the person described in the POS did not match Mejia's description. Mejia is Hispanic (not White), was 60 years old (not 45) at the time of service, 5 feet 4 inches tall (not 5'6"), and 125 pounds (not 140).

RCA declined to stipulate to vacate the judgment, because Mejia had been making payments after being served with the default judgment, without challenging the debt or the judgment. After speaking with the process server, RCA believed Mejia had been served. The POS accurately described her as a female with black hair and brown eyes. Her photo on her Facebook profile showed her light complexion and young appearance, and height and weight are difficult to estimate with accuracy.

RCA opposed the motion to vacate the judgment with a declaration from the registered process server that, pursuant to his custom and practice, he would have asked the women if she was Elisa Mejia and handed her the documents if she said yes. He perceived her fair complexion as White and estimated her height, weight, and age. RCA's manager also submitted a declaration that she spoke with Mejia two weeks after entry of the default judgment, and Mejia agreed to the payment plan.

In reply papers filed April 28, 2014, Mejia submitted a supplemental declaration asserting -- *for the first time* -- that she was in San Francisco at the time of service in Nevada City. She and her daughter and a friend submitted declarations to that effect.

The trial court apparently issued a tentative ruling to vacate the judgment on May 8, 2014. The formal order was filed May 20, 2014, granting the motion to quash the summons/complaint and vacate the judgment.

While Mejia on appeal claims without support that the trial court found the process server's declaration of service to be "false" -- which Mejia seeks to equate with fraudulent -- the Respondent's Appendix contains the trial court's order vacating the judgment, wherein the court expressly stated "the process server's declaration is believable and the court finds that there has been no showing of fraud by the process server" The court simply concluded Mejia sufficiently rebutted the presumption of valid service (Evid. Code, § 647), directed RCA to effect proper service, and set a trial date.

In support of the anti-SLAPP motions, RCA's attorney and its president submitted declarations that on May 8, 2014 (the date of the court's tentative ruling), they sent the Sheriff a "Notice of Termination" of the wage garnishment, and told the Sheriff to return any funds he was holding to Mejia and alert the employer to stop the withholding. RCA believed the POS was valid when they proceeded with garnishment after Mejia stopped her payment plan. RCA's president stated in her October 20, 2014, declaration that RCA has no money from the garnishment. RCA received only one check of \$380.85, which it received after it cancelled the garnishment. It returned the check to the Sheriff's office on May 29, 2014, and it is the "understanding" of RCA's president that the money was returned to Mejia, minus a \$12 administrative fee charged by and paid to the Sheriff, over which RCA has no control.

On July 25, 2014, RCA filed a voluntary dismissal of the collection lawsuit without prejudice. RCA's president Sheila Baker attested RCA dismissed the case to

avoid incurring further costs to pursue the matter. Baker attested the dismissal was “purely a business decision based on my judgment as RCA’s president and the advice of my counsel. As part of this decision, RCA weighed the time and expense of trial versus the amount of damages it was seeking from Mejia. RCA never lost faith in the merits of its claims against Mejia. [¶] I do not personally know Mejia and have never harbored any ill will or animosity against her. The decision to file suit against Mejia was purely a business decision. RCA had not been able to collect upon the overdue bill and determined that legal action to collect the debt needed to be taken”

III

Mejia’s Opposition

Mejia opposed the motions to strike, arguing section 425.16 was not intended to protect activities to obtain a judgment for a “non-existent debt through the use of a false proof of service” and garnish wages “in the face of admitted incontrovertible knowledge that the service of process was false in an attempt to extort further payment”

Mejia’s attorney, E. John Vodonick, submitted his declaration that he told RCA in March 2014 that Mejia had not been served and that her description did not match the POS, and he demanded that RCA withdraw the garnishment and vacate the judgment. Vodonick also submitted exhibits, but the trial court sustained RCA’s objections on the ground of lack of foundation. Two of the exhibits were letters attached to Mejia’s complaint which in any event do not help her case on appeal, i.e., her attorney’s letters to RCA and/or Dignity dated April 2, 2014, and May 10, 2014, first demanding that they vacate the judgment and then noting the court’s decision to vacate the judgment and requesting that RCA instruct the Sheriff to stop garnishment and release funds to Mejia.

Mejia submitted a declaration repeating that she was not served with the collection complaint, but admitting she was “told by RCA that a judgment was entered against me . . . I was frightened and agreed to make some payments to avoid any disturbance with

my employment. Eventually I decided that I should not make those payments because I did not owe the money.” Mejia attested \$1,555.97 was garnished. Some of the garnished wages were returned to her (\$744.13 on June 12, 2014, and \$380.85 on July 7, 2014), but there remained an amount of \$400.99 that was paid to RCA and was not returned to Mejia. Her declaration is dated October 24, 2014.

IV

The Replies

RCA and Dignity filed replies without additional evidence.

V

The Ruling

On January 29, 2015, the trial court issued its order granting the special motions to strike Mejia’s lawsuit. The court rejected Mejia’s procedural challenges to the motions (which she does not revisit on appeal). The court concluded Mejia’s complaint arose from RCA’s and Dignity’s constitutionally-protected rights to free speech and to petition for redress of grievances and was barred by the litigation privilege.

DISCUSSION

I

Anti-SLAPP Statute and Standard of Review

Section 425.16, subdivision (b)(1), provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” The statute provides a procedure for the early dismissal of

lawsuits that are brought to chill the valid exercise of constitutional rights. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056 (*Rusheen*).) The statute is to be construed broadly. (*Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 508.)

We review the trial court's ruling de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis*); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) We consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We do not weigh the evidence or determine its credibility; we instead accept the plaintiff's evidence as true and evaluate the defendant's evidence only to determine if it has defeated the plaintiff's evidence as a matter of law. (See *Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3.)

The analysis of an anti-SLAPP motion involves two steps. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, i.e., acts taken "in furtherance of the [defendant's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue. . . ." (§ 425.16, subd. (b)(1); *Oasis*, *supra*, 51 Cal.4th at pp. 819-820.) An "act in furtherance of a person's right of petition or free speech . . . in connection with a public issue" includes: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

In deciding whether a cause of action arises from protected activity, “the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) An “act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech.” (*Ibid.*) Courts must look to “the act underlying the cause of action, not the gist of the cause of action.” (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1175, 1189-1190, disapproved on other grounds in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 391 (*Baral*).)

When we take this first step and determine whether plaintiff’s causes of action arise from defendants’ protected activity, we do not consider the legitimacy of the plaintiff’s claims. (*City of Costa Mesa v. D’Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371.) If a defendant fails to establish plaintiff’s action is based on defendant’s protected activity, the complaint is not subject to the anti-SLAPP statute. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1550.)

If the defendant makes the requisite showing, we apply the second step, to consider whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Baral, supra*, 1 Cal.5th at p. 384.) At this second step, “the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.” (*Id.* at p. 396.)

At this second step, the plaintiff must introduce evidence sufficient to meet her burden. “More to the point, plaintiff cannot rely on [her] pleading at all, even if verified,

to demonstrate a probability of success on the merits.” (*Hecimovich v. Encinal School Parent Treacher Organization* (2012) 203 Cal.App.4th 450, 474.)

“ ‘Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute -- i.e., that arises from protected speech or petitioning *and* lacks even minimal merit -- is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Oasis, supra*, 51 Cal.4th at pp. 819-820.)

II

Protected Activity

On appeal, Mejia now argues that she did not sue for actions or statements made in connection with the underlying collection lawsuit; rather, she sued for actions performed *after* the underlying collection lawsuit had been terminated in RCA’s and Dignity’s favor by entry of default against Mejia (through use of a “false” proof of service). Mejia argues all of her claims are based on the *postjudgment* activity of garnishing her wages by falsely representing that the underlying judgment was valid, and keeping her garnished wages when the collection judgment was vacated. She argues postjudgment efforts to enforce a judgment do not constitute acts to petition for redress of grievances.

Assuming Mejia has not forfeited this argument by failing to raise it in the trial court, as urged by RCA, it fails because (1) Mejia mischaracterizes her complaint as being based only on postjudgment efforts to enforce the judgment and, (2) enforcement of judgments can be activity protected under the anti-SLAPP statute.

First, Mejia’s complaint falls squarely within the purview of section 425.16, because her claims are based on alleged wrongful activity in connection with the filing, service, and prosecution of the underlying collection lawsuit. These basic acts of litigation are acts in furtherance of the constitutional right to petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1120.) Pleadings and service of process are generally viewed as protected activity. (*Navellier v. Sletten* (2002)

29 Cal.4th 82.) And every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215 (*Daniels*).)

Mejia argues RCA's and Dignity's right to petition for redress of grievance ended upon entry of the default judgment, and the right to petition "simply merged in the judgment" pursuant to section 577, which provides, "A judgment is the final determination of the rights of the parties in an action or proceeding." However, the "merger" rule, which prohibits splitting causes of action, has nothing to do with postjudgment actions to enforce the judgment or with anti-SLAPP motions, and Mejia cites no authority that it does. Moreover, the default judgment did not end the collection lawsuit, and RCA and Dignity were clearly continuing protected litigation activity by defending the default judgment against Mejia's motion to vacate.

Second, postjudgment collection activities to enforce the judgment can be protected speech activity under the anti-SLAPP statute pursuant to the litigation privilege (Civ. Code, § 47, subd. (b)) applicable to tort claims, as held by *Rusheen, supra*, 37 Cal.4th at page 1063. Though *Rusheen* does not apply to the malicious prosecution claim, that claim constitutes protected activity under other authority.

Thus, in *Rusheen*, the plaintiff sued a vexatious litigant's lawyer for abuse of process, alleging he procured a default judgment against Rusheen through the use of false affidavits and then proceeded to enforce the fraudulently-obtained judgment. (*Id.* 37 Cal.4th at pp. 1052-1054.) The trial court granted the lawyer's anti-SLAPP motion. The Court of Appeal reversed, concluding the filing of allegedly perjured documents fell within the litigation privilege (Civ. Code, § 47, subd. (b)) as communicative conduct in the course of a judicial proceeding, but the lawyer's participation in an alleged conspiracy to execute on the resulting improper default judgment was unprivileged, noncommunicative conduct. (*Id.* at p. 1054.)

The question for the California Supreme Court in *Rusheen* was: “Are actions taken to collect a judgment, such as obtaining a writ of execution and levying on a judgment debtor’s property, protected by the litigation privilege of Civil Code section 47, subdivision (b), as ‘communication[s]’ in the course of a judicial proceeding?” (*Id.* 37 Cal.4th at p. 1052.) The Supreme Court concluded “where the cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act. In this case, because the claim for abuse of process was based on the communicative act of filing allegedly false declarations of service to obtain a default judgment, the postjudgment enforcement efforts, including the application for writ of execution and act of levying on property, were protected by the privilege.” (*Ibid.*) The Supreme Court accordingly held the trial court was correct in granting the attorney’s special motion to strike the abuse of process complaint under the anti-SLAPP statute. (*Id.* at pp. 1059-1065.)

Mejia argues *Rusheen*, an abuse of process case, is inapplicable to her malicious prosecution claim, because the litigation privilege does not apply to malicious prosecution claims. (*Rusheen, supra*, 37 Cal.4th at p. 1057 [litigation privilege, though originally enacted with reference to defamation, is now held applicable to any communication and “all torts except malicious prosecution”]; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215 [malicious prosecution claims are permitted because the policy of encouraging free access to the courts is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied].)

However, every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding. (*Daniels, supra*, 182 Cal.App.4th at p. 215.)

Mejia also argues *Rusheen* has no application to her claims alleging statutory violations of unfair business practices and unfair debt collection practices. She cites case law for the proposition that the litigation privilege does not bar claims if application of the privilege would render inoperable a specific statute such as the fair debt collection practices or the unfair competition law. (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 332; *People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267, 1276; *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 337.) However, she fails to discuss those cases, none of which were anti-SLAPP cases. They stand for the narrower proposition that the litigation privilege cannot be used as a defense to an action alleging specific statutory violations, where application of the privilege would “inevitably conflict with” and “negate” those claims, thus rendering the statute “significantly inoperable if it did not prevail over the privilege where . . . the two conflict.” (*Komarova, supra*, 175 Cal.App.4th at pp. 337-340.) Thus, to the extent they are relevant, they would be relevant to the second prong of section 425.16, the determination of “probability of prevailing on” the merits. (E.g., *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 618-619.)

Mejia argues section 425.16 does not protect criminal conduct, and using a void writ of execution to levy upon her wages clearly constitutes a criminal offense under Penal Code section 526, which provides: “Any person who, with intent to obtain from another person any property or other consideration, delivers or causes to be delivered to the other person any paper, document or written, typed or printed form purporting to be an order or other process of a court, or designed or calculated . . . to cause or lead the other person to believe it to be an order or other process of a court, when in fact such paper, document or . . . form is not an order or process of a court, is guilty of a misdemeanor”

However, Mejia’s complaint does not allege a criminal offense under Penal Code section 526. Moreover, the criminal statute appears to address phony documents that

resemble court documents, not true court documents that are later judicially determined to be void or voidable.

Mejia goes even further in her reply brief, arguing, “it is not the act of obtaining the judgment through a false proof of service, entering a judgment based upon that false document or having a writ of execution issued and levying upon [her] wages that are the gravamen of her action. The gravamen of her action and the basis of all of her causes of action is the lack of action on the part of Respondents; the lack of action to halt execution proceedings and return [her] wages to her after Defendants had actual knowledge the proof of service was false and the judgment was void.”

This argument fails on its face because it misrepresents Mejia’s complaint, which on its face complained that RCA and Dignity tried to collect money she did not owe; RCA threatened to commence legal proceedings if she did not pay; RCA filed a legal proceeding in the court and “filed a false proof of service,” got a default judgment, “waited” until it was too late for relief from default, and then instructed the Sheriff to garnish her wages. When told that Mejia had not been served, RCA “refused” to vacate the judgment and instead engaged in “extortionate activities” by proposing that Mejia pay \$3,675 to settle the “non-existent debt.”

Moreover, Mejia’s complaint and its attached letter from RCA acknowledge that RCA *did* take immediate action to halt execution proceedings as soon as the trial court made its tentative ruling that service was invalid and vacated the judgment. Until that point, RCA and Dignity did not have “actual knowledge” that service was invalid. Mejia cites no authority that a county auditor’s delay in returning garnished wages “immediately” gives rise to a viable cause of action against RCA or Dignity.

Despite Mejia’s argument that her complaint alleges lack of action by RCA to halt garnishment after the judgment was vacated, her complaint merely alleges that, after the tentative ruling, Mejia demanded that RCA instruct the Sheriff to cease garnishment and immediately return garnished wages, and RCA refused to return her wages to her, instead

informing her that once the Sheriff notifies the County Auditor to return the funds, it can take several weeks for the Auditor to mail the check.

Mejia cites two cases -- *Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, and *Chacon v. Litke* (2010) 181 Cal.App.4th 1254, 1257 -- for the proposition that the *failure* to act is not in *furtherance* of the right to petition, and the right to petition ends upon entry of judgment. Neither case helps Mejia. *Optional Capital* held the litigation privilege did not apply to claims for conversion and fraudulent conveyance, because the plaintiff alleged an independent, noncommunicative, wrongful act -- the defendant's conspiracy with other parties to assert dominion and control over funds in which the plaintiff had a judgment lien and transfer of those funds out of the plaintiff's reach in violation of its rights as judgment creditor. (*Id.* at pp. 1404-1405.) *Chacon* held a landlord's conduct in refusing to allow a tenant to reoccupy premises after a "temporary eviction" for repairs under a city ordinance was not an effort by the landlord to "enforce" the unlawful detainer judgment or stipulation, neither of which awarded the landlord permanent possession. (*Id.* at p. 1257.)

We conclude plaintiff's causes of action arise from defendants' protected activity under section 425.16.

III

Probability of Prevailing on Merits

A. Malicious Prosecution

As to Mejia's first cause of action for malicious prosecution, she cannot prevail because that cause of action requires proof that the prior litigation terminated in Mejia's favor, was brought without probable cause, and was initiated with malice. (*Lane v. Bell* (2018) 20 Cal.App.5th 61, 67.)

The prior action did not terminate in Mejia's favor. It ended with a voluntary dismissal by RCA without prejudice. Generally, a voluntary dismissal is not a favorable

termination for purposes of malicious prosecution. (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1057.) A voluntary dismissal may be deemed a favorable termination for purposes of malicious prosecution if the dismissal reflects the opinion of the court or the *prosecuting* party (not the defending party) that the action lacks merit or would yield an adverse judgment. (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855.)

Here, there is nothing reflecting that RCA dismissed the case because it felt the collection action lacked merit or would yield an adverse judgment. Instead, as indicated, RCA's president attested the dismissal was "purely a business decision based on my judgment as RCA's president and the advice of my counsel. As part of this decision, RCA weighed the time and expense of trial versus the amount of damages it was seeking from Mejia. RCA never lost faith in the merits of its claims against Mejia. [¶] I do not personally know Mejia and have never harbored any ill will or animosity against her. The decision to file suit against Mejia was purely a business decision. RCA had not been able to collect upon the overdue bill and determined that legal action to collect the debt needed to be taken"

Although RCA may have been entitled to recover fees and costs from Mejia, as reflected in the default judgment, the record shows the difficulty in collecting even the debt from Mejia based on her resources, never mind the fees and costs. Additionally, RCA's attorney attested that, after RCA dismissed the complaint, Mejia moved for attorney fees as the prevailing party, but the trial court found she was not the prevailing party in a tentative ruling awaiting formal order at the time of the attorney's declaration.

Thus, there is no favorable termination to support a malicious prosecution claim.

We reject Mejia's argument that the prior litigation that was maliciously prosecuted was not the underlying collection lawsuit, but the continued postjudgment garnishment after Mejia's lawyer told them she was not served which, according to Mejia, gave RCA "absolute knowledge that 'gutter service' had been made." However, a

judgment debtor's claim of defective service is not proof of defective service, nor was the description so far off as to compel a conclusion that Mejia was not served.

Mejia has not established that RCA lacked probable cause or acted with malice. The motive of the party who filed the prior action must have been something other than that of the satisfaction in a civil action for some personal or financial purpose. (*Daniels, supra*, 182 Cal.App.4th at pp. 224-225.) Here, wrongful motives are alleged with no factual basis.

B. Conversion

As to the second cause of action for conversion, Mejia failed to show the essential element that the defendant disposed of plaintiff's property in a manner inconsistent with her property rights. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) She relies on her own declaration and ignores RCA's evidence.

RCA's evidence shows it holds no money garnished from Mejia's wages. One check for \$380 was received from the Sheriff's Department, but RCA did not cash that check and instead returned it to the Sheriff's Department to be refunded to Mejia.

Mejia relies on her declaration, which acknowledged that \$380.85 was returned to her on July 7, 2014, but asserted "the amount of \$400.99 was never returned to me; that amount was paid to RCA. RCA has never returned that money to me."

However, her declaration is insufficient on its face because it lacks any foundation for Mejia's assertion that RCA received the money -- a fact obviously not within Mejia's personal knowledge. Although we treat the plaintiff's evidence as true in reviewing a section 425.16 motion (*Daniels, supra*, 182 Cal.App.4th at p. 215), Mejia presents no evidence that RCA received that money to rebut RCA's evidence that it did not. Additionally, even assuming her calculations of the amounts garnished are correct, if the Sheriff or County Auditor failed to return \$400.99, Mejia cites no authority for a claim

against RCA which, as far as the evidence discloses, did not even know any amount was still outstanding.

Mejia also fails to overcome the litigation privilege (Civ. Code, § 47, subd. (b)), which extends to postjudgment enforcement activities in tort cases. (*Rusheen, supra*, 37 Cal.4th at p. 1063.)

C. Unfair Debt Collection Practices

Civil Code section 1788.15 provides “(a) No debt collector shall collect or attempt to collect a consumer debt by means of judicial proceedings *when the debt collector knows* that service of process, where essential to jurisdiction over the debtor or his property, has not been legally effected.” (Italics added.)

Here, an independent registered process server was used and provided a facially valid POS. RCA’s discovery that the description did not match Mejia exactly and that Mejia was now claiming she had not been served with summons and complaint (after agreeing to a payment plan without protest) did not constitute knowledge by RCA that service of process was invalid, because her Facebook photo supported the process server’s description of her complexion and estimated age, and height/weight are difficult to estimate with accuracy. Her belated disclosure that she was out of town at the time of service was made in reply papers filed shortly before the court’s tentative ruling to quash service and vacate the judgment -- at which point RCA immediately notified the Sheriff to stop the garnishment.

While she filed her reply about 10 days before the ruling, there is no evidence as to when RCA’s attorney read the reply. Nor is there any evidence that RCA had reason to know that the reply added this completely new information which, of course, was always within Mejia’s knowledge.

D. Unfair Business Practices

The fourth cause of action alleges unfair business practices under Business and Professions Code section 17200, which defines unfair competition as any unlawful, unfair or fraudulent business act or practice. Mejia offers no evidence whatsoever to support her allegations (which are based on “inform[ation] and belie[f]”) that RCA and Dignity “have engaged in a constant and continuing practice of causing the default of various persons to be entered in Nevada County Superior Court based upon false proofs of service and thereafter engaging in oppressive and wrongful collection practices.” Her appellate brief tries to bootstrap this statutory claim onto her statutory claim under the fair debt collection practices, which fails as we have explained.

We conclude the trial court properly granted RCA’s and Dignity’s special motions to strike Mejia’s complaint under section 425.16.

DISPOSITION

The order granting the special motions to strike Mejia’s complaint is affirmed. RCA and Dignity shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

HULL, Acting P. J.

We concur:

ROBIE, J.

MURRAY, J.